

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CEMEX, INC.**

**and**

**Cases 28-CA-22165  
28-CA-22169  
28-CA-22220  
28-CA-22313  
28-CA-22409  
28-CA-22534  
28-CA-22699  
28-CA-22711  
28-CA-22726  
28-CA-22967**

**GENERAL TEAMSTERS (EXCLUDING  
MAILERS), STATE OF ARIZONA, LOCAL  
UNION NO. 104, AN AFFILIATE OF THE  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS**

**CEMEX, INC.**

**and**

**Cases 28-CA-22267  
28-CA-22419  
28-CA-22823  
28-CA-22894**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 428, AFL-CIO**

**CEMEX'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL  
FROM THE ADMINISTRATIVE LAW JUDGE'S PROTECTIVE ORDER**

### *The ALJ's Order*

Respondent CEMEX requests special permission to appeal one aspect of Administrative Law Judge Burton Litvack's September 13, 2010 protective order, entered in the above-referenced matters. In that protective order (attached as Exhibit 1), the ALJ appropriately provides attorneys-only disclosure protection for CEMEX's profit-and-loss data, but does not afford similar protection for CEMEX's other highly-sensitive confidential information on customer identity, order histories, product volumes purchased, locations delivered to, and pricing data, as well as non-union wage data. As to those categories of confidential information, the ALJ determined that the Charging Party unions could access that information within the Region's office area.

The ALJ properly applied the attorneys-only protections to the profit-and-loss data because he found that the Charging Party unions could inappropriately use such information against CEMEX in bargaining, recognizing that one cannot "unlearn" something once known. However, he did not apply the same logic to the disclosure of non-union wage data, which the Charging Party unions could likewise use against CEMEX in bargaining and could – likewise – not "unlearn" at the end of this case. Additionally, the ALJ did not account for the devastating damage that the Charging Party unions could do to CEMEX's competitive position by using CEMEX's highly-sensitive customer information to their advantage during their dealings with CEMEX's competitors, many of whom have employees represented by the same unions. And of course, neither CEMEX nor the ALJ would ever know if the Charging Party unions used CEMEX's confidential customer information behind closed doors with one of CEMEX's

competitors to CEMEX's disadvantage or to the Charging Party unions' inappropriate advantage.

### **CEMEX's Request**

CEMEX asks the Board to extend the attorneys-only disclosure protection to the production of CEMEX documents containing customer identity, order histories, product volumes purchased, locations delivered to, and pricing data, as well as non-union wage data. Such protection is fully consistent with Board law.

For example, NLRB Rules and Regulations § 102.38 allows for the possibility that Charging Party Unions will “appear at such hearing in person, *by counsel*, or by other representative . . . .” And that section provides that “participation of any party shall be limited to the extent permitted by the administrative law judge.” Indeed, the NLRB endorses the use of “attorneys only” protective orders given the proper circumstances and even cites to an “attorneys only” protective order case in its “ALJ Bench Book.” *See Division of Judges Bench Book 2005 Supplement*, § 8-330, citing *inter alia*, *United Parcel Service*, 304 NLRB 693, 693-694 (1991) (where the ALJ ordered that the use of confidential information “shall be limited to this hearing and shall neither be disclosed nor disseminated to other than counsel of record at this hearing”); *see also Dlubak Corp.*, 307 NLRB 1138, 1160 (1992) (where the ALJ “issued a protective order restricting the General Counsel from disclosure outside of the NLRB of financial information provided by the Respondent in compliance with the subpoena”).

Notably, during the Counsel for General Counsel's enforcement action on a prior subpoena in this matter that requested the exact same information, the Federal District

Court granted attorneys-only disclosure protection for the same Confidential Information because the Court found that “CEMEX has a substantial interest in protecting the confidentiality of their customer lists and profit/loss statements . . . [including] customer name, volume bought, price, and place of delivery” from “competitor and potential competitors” and “labor unions.” (See Court’s February 1, 2010 Protective Order, at 3, 6-7, attached as Exhibit 2). As to the Protective Order, the Court found on the extensive record before it that unprotected disclosure of CEMEX’s Confidential Information could cause “considerable harm with competitors potentially undercutting CEMEX’s prices to all of their customers with very little effort” and with labor unions that could “use it to bargain against CEMEX.” (Id.).

### **Conclusion**

For the foregoing reasons, CEMEX respectfully requests that the Board modify the ALJ’s protective order to extend the attorneys-only disclosure protections to all documents containing customer identity, order histories, product volumes purchased, locations delivered to, and pricing data, as well as non-union wage data.

RESPECTFULLY SUBMITTED this 14th day of September, 2010.

STEPTOE & JOHNSON LLP

By /s/ Steven D. Wheelless  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the **REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL FROM THE ADMINISTRATIVE LAW JUDGE'S PROTECTIVE ORDER**, in Cases 28-CA-22165 et al., was served via E-Gov, E-Filing, facsimile, and e-mail on this 14th day of September, 2010, on the following:

***Via E-Gov E-Filing:***

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW, Rm. 11602  
Washington, D.C. 20570-0001

Honorable Mary M. Cracraft  
Associate Chief Administrative Law Judge  
Division of Judges  
National Labor Relations Board  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

***One copy via e-mail:***

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/s/ Monica Medlin, Legal Secretary

# **Exhibit 1**

**Exhibit 1**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES – SAN FRANCISCO BRANCH**

**CEMEX, INC.**

**and**

**Cases 28-CA-22165  
28-CA-22169  
28-CA-22220  
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**GENERAL TEAMSTERS (EXCLUDING  
MAILERS), STATE OF ARIZONA, LOCAL  
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28-CA-22419  
28-CA-22781  
28-CA-22823  
28-CA-22894**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 428, AFL-CIO**

**PROTECTIVE ORDER**

The undersigned Administrative Law Judge finds that, for good cause shown, a Protective Order should issue to protect and control the production and use of Respondent's confidential and commercially-sensitive information throughout and after the completion of this action. Accordingly, the Counsel for General Counsel, its staff, the parties, their representatives, attorneys, and agents, witnesses, and observers shall comply with the following:

1. Confidential information produced by Respondent shall be secured and maintained by Counsel for General Counsel in a manner so as to avoid disclosure or dissemination of its

**ALJ - 2**



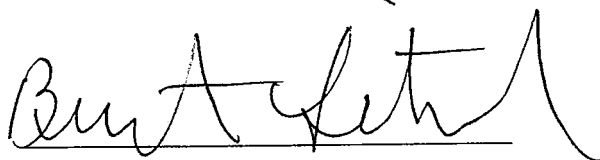
contents to any person not identified in this Order or in a manner not specifically authorized by this Order.

2. To control the significant potential for damaging disclosure or dissemination of Respondent's Confidential Information by the adverse Charging Parties, only Respondent, witnesses (if necessary), the Counsel for General Counsel, the Charging Parties' counsel-of-record, and a single, non-attorney Charging Party representative designated by each of the Charging Parties' counsel-of-record may see or use Confidential Information, and only in the Hearing Room or the Counsel for the General Counsel's offices, and only to prepare to examine witnesses, to prepare aides for witness examination, to create possible documentary evidence, to examine/cross-examine witnesses, or to draft post-hearing or appellate briefs. Witnesses, the Counsel for General Counsel, Charging Party attorneys, and their designated representative shall not otherwise attempt to make copies, notes, or record Confidential Information, and shall not remove, use, or disclose Confidential Information for any purpose outside the Hearing Room or Counsel for General Counsel offices. The undersigned ALJ will instruct witnesses regarding this Order at the time they are shown Confidential Information.

3. Notwithstanding the foregoing, with regard to any Confidential Information that may involve profit and loss information, such Confidential Information shall be viewed or used during and after the Hearing only by witnesses (if necessary), Respondent, the Counsel for the General Counsel, and counsel-of-record for each of the Charging Parties. Likewise, if it becomes necessary for Counsel for the General Counsel or counsel-of-record for either of the Charging Parties to view job ticket records described in paragraphs 21(a)-(d), 33-35, 38 or 39 of the subpoenas duces tecum, said documents shall be made available by Respondent at its facilities for viewing and secured copying only by said attorneys, if desired.

4. Respondent shall only produce one copy of the Confidential Information, if required, by an un-revoked or modified subpoena, excepting that Respondent need only make Job Tickets available for viewing on-site due to their voluminous nature.
5. Members of the public and all those not specifically allowed access to Confidential Information under this Order shall be excluded from the hearing at times when the Confidential Information is discussed.
6. Respondent may move to place any Confidential Information (either documents or testimony) under seal at the time offered at trial.
7. This Order shall continue to be binding throughout and after the final disposition of this action. All Confidential Information shall be used only for the prosecution and/or defense of this action. Within fifteen days (15) after receiving notice of a ruling by the undersigned, Counsel for General Counsel shall return all Confidential Information (including all copies, summaries, and excerpts) to Respondent's Counsel, except Confidential Information Exhibits admitted by the undersigned into evidence in this matter, which shall be returned to CEMEX's counsel within fifteen (15) days after the exhaustion of all appeals, if any.

Ordered this 13<sup>th</sup> day of Sep., 2010.

A handwritten signature in black ink, appearing to read "Burton Litvack", written over a horizontal line.

Administrative Law Judge Burton Litvack

# **Exhibit 2**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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NATIONAL LABOR RELATIONS  
BOARD,

No. 2:09-cv-2546-PHX-JAT

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Plaintiff,

**AMENDED ORDER** (amending Order at  
Doc. # 25)

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vs.

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CEMEX, INC.,

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Defendant.

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Pending before the Court is National Labor Relations Board's ("NLRB") application pursuant to § 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2) for compliance on the part of CEMEX, Inc. ("CEMEX") with a subpoena duces tecum dated September 4, 2009 (Doc. # 1). The Court held an initial hearing on December 7, 2009. On the basis of the December 7 hearing and the arguments contained in the parties' moving papers, the Court will address in part the issues presented by NLRB's application. The remaining issues will be considered at the January 22, 2010, hearing. In short, in this Order the Court will address CEMEX's request for a protective order and to seal the discovery documents, reserving argument and determination on the remaining issue of whether the Court should enforce the September 4, 2009, subpoena duces tecum.

1 **I. BACKGROUND**

2 On June 30, 2009 the NLRB's General Counsel issued and served on CEMEX a  
3 Fourth Amended Consolidated Complaint and a notice of hearing charging CEMEX with  
4 violating various statutes for, *inter alia*, diverting work from its union-represented employees  
5 to its non-unionized workforce and closing two of its unionized facilities. The NLRB  
6 contends CEMEX's conduct was undertaken based on its employees' union activities. (Doc.  
7 #2). On September 4, 2009, the NLRB issued a subpoena duces tecum to CEMEX's  
8 Custodian of Records. (Doc. #2, Ex. A). Upon CEMEX's refusal to produce documents the  
9 NLRB took action in this Court on October 5, 2009 for the enforcement of the September 4,  
10 2009 subpoena duces tecum against CEMEX.

11 **II. CEMEX's REQUEST FOR PROTECTIVE ORDER AND TO SEAL**  
12 **DOCUMENTS**

13 **A. Protective Order Is Granted**

14 CEMEX claims it needs a protective order with regards to Items 23 and 28 because  
15 those documents contain competitively and financially sensitive information, and also  
16 contain customer information.<sup>1</sup>

17 "[T]he public can gain access to litigation documents and information produced  
18 during discovery unless the party opposing disclosure shows 'good cause' why a protective  
19 order is necessary." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002).  
20 The district court is allowed to override the presumption of public access where "good cause"  
21 is shown. FED.R.CIV.P. 26(c); *Phillips*, 307 F.3d at 1210. "For good cause to exist, the party  
22 seeking protection bears the burden of showing specific prejudice or harm will result if no  
23 protective order is granted." *Phillips*, 307 F.3d at 1210-11. "Broad allegations of harm,  
24 unsubstantiated by specific examples or articulated reasoning do not satisfy the Rule 26(c)  
25 test." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9 Cir. 1992) (quotation  
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27 <sup>1</sup>The ALJ found good cause for granting a protective order regarding the profit/loss  
28 statements and the customer information as to Item 23; however, denied the request to seal  
the documents.

1 omitted). The Court will balance the public and private interests to decide if a protective  
2 order is necessary if particularized harm is found. *Phillips*, 307 F.3d at 1211.

3 CEMEX has a substantial interest in protecting the confidentiality of their customer  
4 lists and profit/loss statements from the general public, and more specifically, their  
5 competitors and potential competitors. If this information were allowed to be public,  
6 CEMEX could suffer considerable harm with competitors potentially undercutting  
7 CEMEX's prices to all of their customers with very little effort. Some of the harmful  
8 information requested would include customer name, volume bought, price, and place of  
9 delivery. Furthermore, CEMEX claims if the information was public, labor unions would  
10 use it to bargain against CEMEX. Accordingly, CEMEX has provided specific examples and  
11 articulated reasoning as to why there would be harm absent a protective order.

12 CEMEX's showing of good cause is stronger when balanced against the public's  
13 interest to documents during the discovery process. The right to inspect and copy judicial  
14 records is generally "justified by the interest of citizens in keeping a watchful eye on the  
15 workings of public agencies" and "understanding the judicial process." *Kamakana v. City*  
16 *and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations and quotations  
17 omitted). However, "[t]he public has less of a need for access to court records attached only  
18 to non-dispositive motions because those documents are often 'unrelated, or only tangentially  
19 related, to the underlying cause of action.'" *Id.* at 1179 (quotation omitted).

20 Therefore, given CEMEX's considerable need for protection of commercially  
21 sensitive information and the public's relatively low need for access to documents produced  
22 during discovery, the balance weighs in favor of issuing a protective order as to Item 23 and  
23 28. It is important to note that the documents produced during discovery might never make  
24 it onto any type of dispositive motion, or be admitted into evidence at trial.

25 **B. Sealing Documents is Premature**

26 **1. In General**

27 CEMEX argues that they need the additional protection of having the documents  
28 sealed. However, this Court disagrees, and finds that putting the documents under seal would

1 be premature. *See, e.g.*, LRCiv 5.6 (“The Court generally will not enter an order that gives  
2 advance authorization to file documents under seal that are designated . . . under a protective  
3 order or confidentiality agreement.”). Since the case is still in the discovery stages, many of  
4 the documents produced will be “unrelated, or only tangentially related, to the underlying  
5 cause of action.” *Kamakana*, 447 F.3d at 1179. “Materials unearthed during discovery . . .”  
6 are private and not a part of the judicial record, which are “public documents almost by  
7 definition, and the public is entitled to access by default.” *Id.* at 1180 (citation omitted).  
8 Therefore, sealing documents that are already subject to a protective order at the discovery  
9 stage is unnecessary.

10 If the court were to add the additional protection of a seal, “once the [sealed  
11 discovery] documents [were] made part of a dispositive motion [e.g., a summary judgment  
12 motion ruled upon by the court] . . . they [would] lose their status of being raw fruits of  
13 discovery,’ and no longer enjoy protected status ‘without some overriding interests in favor  
14 of keeping the discovery documents under seal.’” *Foltz v. State Farm Mut. Auto. Ins. Co.*,  
15 331 F.3d 1122, 1136 (9th Cir. 2003) (quotation omitted). After losing status as a sealed  
16 document, in order to keep it sealed when attached to a dispositive motion or when admitted  
17 to the trial record, it will have to meet the “compelling reasons” standard. *Kamakana*, 447  
18 F.3d at 1179. Without more, a “good cause” showing will not satisfy the “compelling  
19 reasons” test. *Id.* at 1180. Because this Court finds sealing the discovery documents  
20 premature, it does not address whether CEMEX has “compelling reasons” for protection  
21 under seal.

## 22 2. Freedom of Information Act (“FOIA”)

23 CEMEX also argues that additional protection above a protective order is needed  
24 because the information is subject to the FOIA. (Doc. #7 at 9). CEMEX claims not having  
25 the documents sealed would leave open the possibility that the unions or any competitor  
26 could request the information, essentially eviscerating the protection of the confidential  
27 information. *Id.* The NLRB argues that an FOIA request for documents is too speculative  
28 and an insufficient reason to seal the documents. (Doc. #10 at 6).

1 This Court agrees with the NLRB that the *potential* for an FOIA request is insufficient  
2 to require the sealing of the documents. There is no guarantee that an FOIA request will be  
3 encountered in the present case. Furthermore, the "FOIA provisions offer sufficient  
4 protection for [CEMEX] during the period . . . which charging parties may seek information  
5 from their files." *E.E.O.C. v. AON Consulting, Inc.*, 149 F.Supp.2d 601, 609 (S.D. Ind.  
6 2001). CEMEX is required to receive notice of such requests for commercially sensitive  
7 information so that they have an opportunity to object to its disclosure. See 5 U.S.C. §  
8 552(b)(4); 29 C.F.R. § 1610.19; *AON Consulting*, 149 F.Supp.2d at 609. In addition to the  
9 notice requirement, the protective order language requires the NLRB to return the documents  
10 fifteen (15) days after the close of the record.

11 Therefore, for the reasons stated above, the Court denies CEMEX's request to seal the  
12 documents.

### 13 **III. JOINT DOCUMENT AND PRODUCTION COSTS STATEMENT**

14 The Court will set argument on the remaining issue for January 22, 2010, at 1:30 PM.  
15 The Court will not revisit the protective order and sealing issues.

16 The parties shall jointly prepare and file by January 15, 2010, a statement of each of  
17 NLRB's requests currently before the Court, organized as follows:

18 1. A description of the item or category of items requested and rationale and  
19 anticipated need for the item(s).

20 A. The objection or objections by defendant to the request and rationale for  
21 each objection. If the objection includes length of time needed to respond to  
22 the request, or additional cost incurred in responding to the request (in the  
23 event the Court decides to shift the burden of cost to the NLRB), the  
24 respondent shall specify how much time or cost is anticipated.

25 B. If the respondent proposes an alternative source of the information sought,  
26 then Plaintiff shall specify in detail why the alternative is unacceptable and  
27 will not substantially suffice for the purpose requested.

28 2. Next item, etc.



1 Accordingly,

2 **IT IS ORDERED** that National Labor Relations Board's application pursuant to  
3 §11(2) of the National Labor Relations Act (Doc. # 1) is granted in part, denied in part, and  
4 Ordered to remain pending for further resolution at the January 22, 2010, hearing.

5 **IT IS FURTHER ORDERED** that CEMEX's Motion for Leave to File Sur-Reply  
6 (Doc. # 14) is denied.

7 **IT IS FURTHER ORDERED** setting oral argument on the remaining issues as  
8 discussed above for January 22, 2010, at 1:30 PM in Courtroom 503, 401 West Washington  
9 Street, Phoenix, AZ 85003. To assist the court reporter, the parties shall prepare and bring  
10 to the oral argument a Table of Authorities, in alphabetical order, which includes all of the  
11 authorities on which the parties will rely at oral argument. The Table of Authorities shall not  
12 exceed the scope of the parties pleadings.

13 **IT IS FURTHER ORDERED** that the parties shall jointly prepare and file the  
14 document above referenced on or before January 15, 2010.

15 The Court enters the following with respect to the Protective Order discussed above:

16 **IT IS ORDERED** that documents produced by CEMEX to Counsel for General  
17 Counsel that are marked "Confidential" shall only be disclosed to the ALJ and the court  
18 reporter, Counsel for General Counsel and its staff, and witnesses who are under oath and  
19 actually testifying about such Confidential Information in the underlying proceeding.  
20 Confidential Information produced by CEMEX shall be secured and maintained by Counsel  
21 for General Counsel in a manner so as to avoid disclosure of its contents to any persons not  
22 identified herein. All witnesses who are shown such Confidential Information during their  
23 testimony are hereby ordered to maintain such information in confidence and to not disclose  
24 the contents of such Confidential Information outside their testimony in this proceeding.

25 **IT IS FURTHER ORDERED** that Confidential Information introduced in these  
26 proceedings shall not be disclosed to or discussed with the Charging Party Unions or their  
27 agents or representatives. Specifically, Counsel for General Counsel and witnesses in these  
28 proceedings are hereby precluded from disclosing Confidential Information to or discussing

1 Confidential Information with the Charging Party Unions, their agents or their  
2 representatives. Further, the Charging Party Unions and any competitors shall be excluded  
3 from the hearing at times when the Confidential Information is being discussed.

4 **IT IS FINALLY ORDERED** that this Order will continue to be binding throughout  
5 and after the final disposition of this action. All Confidential Information shall be used only  
6 for the prosecution and/or defense of this action. Within fifteen days (15) after the close of  
7 the record, Counsel for General Counsel shall return all Confidential Information and any  
8 copies thereof (including summaries and excerpts) to CEMEX's Counsel.

9 Amended *nunc pro tunc* effective 21<sup>st</sup> day of December, 2009.

10 DATED this 1<sup>st</sup> day of February, 2010.

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13 James A. Teilborg  
14 United States District Judge  
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